



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE NO. 898 OF 2010

OSTERIA ICE CREAM LIMITED.....PLAINTIFF

VERSUS

THE JUNCTION LIMITED (TJL).....DEFENDANT

RULING

By an application by Notice of Motion dated 30th December, 2010, the applicant in this matter sought an interlocutory injunction restraining the respondent from evicting the applicant from some business premises upon the expiry of a license whose duration was about to expire on 31st December, 2010 by effluxion of time. On 5th April, 2011, this court dismissed the said application on the grounds that it had no merit.

Following that dismissal, the applicant made this application by Notice of Motion dated 7th April, 2011, and taken out under Order 42 Rule 6 of the Civil Procedure Rules and all other provisions of the law. The application prays for orders that the court be pleased to issue a stay of execution of the ruling and order pending the hearing and determination of this application and also pending the lodging, hearing and determination of an intended appeal against the said order.

The application is supported by the annexed affidavit of Maurizio Corti, a Director of the applicant Company, and is based on the grounds that the applicant intends to appeal against the aforesaid ruling and has filed a Notice of Appeal; that the applicant has been served with a notice to vacate the premises within 2 hours; that should the applicant be forcefully evicted, it stands to suffer substantial loss and damage; and that no order for eviction has been obtained by the respondent.

The application is opposed by way of a replying affidavit sworn on 13th April, 2011, by one James Karoki Muriu, the retail portfolio Manager of the respondent's Managing agent, in which he deposes that the applicant has vacated the suit premises and the respondent has already taken possession of the same. The respondent also filed grounds of opposition on 13th April, 2011 stating as follows -

(1) The orders sought are not capable of being granted since the ruling and order delivered on 5th April, 2011, did not require any execution.

(2) The application brought by the applicant has been overtaken by events as the applicant vacated the premises on 7th April, 2011.

(3) The instant application is an abuse of the court process.

At the oral canvassing of the application, Dr Khaminwa appeared for the applicant and argued that until now, no order of the court had been extracted by the respondent, and no eviction proceedings had been commenced. He submitted that the respondent should have waited till orders were extracted. He further argued that the applicant's property was still in the premises and therefore the applicants are still in possession of the premises.

Opposing the application, Mr. Njeru for the respondent relied on both the grounds of opposition and the replying affidavit. He argued that the license which is the subject matter of this suit expired on 31st December, 2010, and the applicant remained in the suit premises on the strength of injunction orders issued on 30th December, 2010. In its ruling, the court found that the applicant had not established a *prima facie* case and there was no other basis upon which the applicant could continue to carry on business in the premises. On the contrary, the applicant had already vacated those premises, and the respondent had taken possession of the same.

After considering the pleadings and submissions of counsel, I note that the ruling which is sought to be stayed was based on an agreement whose term had expired by effluxion of time. Prior to its expiry, the respondent had made it clear that it would not extend it any further and it was entitled to do so in terms of the agreement in the license. Furthermore, one of the clauses in the agreement was to the effect that after the expiration of the period of the license, the applicant would vacate the designated space and give up all the keys to the respondent. On the premise that the duration of the agreement was for a fixed period of twelve (12) months which was not going to be extended, and upon whose effluxion the applicant would be required to hand over the keys to the respondent, the court found that the applicant had not established a *prima facie* case with a probability of success and dismissed the application for injunction. That was the only order that the court made. On that basis, I agree with the respondent that the ruling and the order of the court dismissing the application did not require any execution, and therefore there is nothing to be stayed.

As matters now stand, after the above ruling was delivered, the applicant was given notice by the respondent on 7th April, 2011, to vacate the suit premises within two (2) hours. It was then that the applicant filed this application on 8th April, 2011, and the same came for hearing under a certificate of urgency on 11th April, 2011. This was four (4) days after the applicant had been served with notice to vacate. Although Dr Khaminwa for the applicant stated from the bar that the applicant was still in possession of the premises, this does not bear any support from the supporting affidavit sworn by Maurizio Corti, a Director of the applicant Company.

On the other hand, the replying affidavit sworn by James Karoki Muriu on 13th April, 2011 states clearly that the applicant vacated the premises on the 7th April, 2011, took away some of its possessions, and those left were stored in the basement of the respondent's premises. According to that affidavit, the applicant's goods were removed from the premises in the presence of Linet Osiemi, the applicant's Director's personal assistant; a representative from the respondent's agents by the name of Rehema Maema; and a representative from KK Security Group by the name of Julius Kwoba. All the three of them signed a document to the effect that they witnessed the applicant's equipment being moved away from the premises to the basement. A copy of the document is attached to the replying affidavit. That piece of evidence has not been controverted in any way and it leads me to find that the applicant is not in possession of the premises. It is the respondent who is now in possession of those premises.

On account of foregoing, I find that there is nothing in the ruling dated 5th April, 2011, to be stayed and

that the application for stay of execution has no merit. It is accordingly dismissed with costs to the respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 19th day of April, 2011.

L NJAGI

JUDGE